

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2032

Cir. Ct. No. 2006CV7238

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**COMMERCE BLUFF ONE CONDOMINIUM ASSOCIATION,
INC., ROBERT NEVILLE, STEVEN COSTELLO, MANUEL TORRES,
KATHY TORRES, FREDY P. CANALES LIVING TRUST, ELAINE
CANALES WILSON LIVING TRUST, JINHUA GAO, QI SUN, RICHARD
DURKIN, PAUL ROBB, ROD HOLLOWAY, ROSE HOLLOWAY,
BENJAMIN MANDELMAN AND ELLEN MANDELMAN,**

PLAINTIFFS,

V.

ACUITY AND CINCINNATI INSURANCE COMPANY,

DEFENDANTS,

TIMOTHY J. DIXON AND CORNERSTONE PROPERTY DEVELOPMENT, LLC,

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,**

V.

LINDA PETERSON,

THIRD-PARTY DEFENDANT-RESPONDENT,

**HUSTAD ROOFING, INC. AND SOCIETY INSURANCE,
THIRD-PARTY DEFENDANTS.**

APPEAL from an order of the circuit court for Milwaukee County:
JANE V. CARROLL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Timothy J. Dixon and Cornerstone Property Development, LLC (collectively, Cornerstone), appeal an order that dismissed their various claims against Linda Peterson upon the parties' stipulation that Cornerstone had no damages. We affirm.

BACKGROUND

¶2 In 2006, the Commerce Bluff One Condominium Association and some of its individual condominium owners (collectively, Commerce Bluff), sued Cornerstone, alleging defects in a condominium building that Cornerstone developed. In 2008, Cornerstone filed a third-party claim against Peterson, who had purchased an unfinished unit in the building. Cornerstone alleged that Peterson modified her unit in ways that damaged the overall structure of the building.

¶3 Cornerstone eventually settled the lawsuit with Commerce Bluff. Most of the settlement was covered by Cornerstone's insurer, but Cornerstone itself paid \$25,000, including \$10,000 as compensation for Cornerstone's

intentional conduct. Peterson then offered to settle the third-party suit against her by paying Cornerstone \$15,000 plus costs.¹ Cornerstone rejected the offer.

¶4 At a hearing on May 22, 2012, the parties notified the trial court that the matter would proceed to trial as scheduled on July 9, 2012, and Peterson asked that Cornerstone file an itemization of damages. Cornerstone first responded by noting its legal theories, stating that it had “a claim for contribution and a claim for indemnification” and an additional “tort-like claim” under WIS. STAT. § 893.89 (2011-12).² Cornerstone then said that, in addition to the \$15,000 paid to Commerce Bluff, Cornerstone sought to recover “at least a quarter of a million dollars in legal fees” and, for the claim under § 893.89, a further amount that the jury would ultimately determine. Cornerstone concluded, however, that if Peterson “would like to see a piece of paper that says ‘itemization of damages’ to which a number is attached,” Cornerstone would be “more than happy” to satisfy the request.

¶5 The trial court agreed that Peterson’s request for an itemization of damages was reasonable. Cornerstone offered to file the itemization the next day, and the trial court adopted the proposed deadline.

¶6 On May 23, 2012, Cornerstone filed a document entitled “Defendants/Third Party Plaintiffs Timothy J. Dixon and Cornerstone Property Development, LLC’s Itemization of Damages.” The document, signed by

¹ Cornerstone did not seek to recover from Peterson the \$10,000 attributable to Cornerstone’s intentional conduct.

² Cornerstone did not identify the version of the statutes supporting the claim under WIS. STAT. § 893.89, but the statute has not been amended since 1993, so we cite the current version. All subsequent references to the Wisconsin Statutes are also to the 2011-12 version unless otherwise noted.

Cornerstone's counsel, provides in its entirety: "Defendants/Third Party Plaintiffs, Timothy J. Dixon and Cornerstone Property Development LLC's damages, currently, are in the amount of \$333,000.27, not including taxable costs and/or interest. This also does not include all damages pursuant to WIS. STAT. § 893.89."

¶7 Peterson moved for relief on June 19, 2012, asserting that the document entitled "itemization of damages" did not, in fact, itemize Cornerstone's damages. She asked the trial court either to dismiss the third-party complaint against her or, alternatively, to adjourn the trial to permit discovery as to the particulars of the damages claimed. Cornerstone filed a response that same day. In the response, Cornerstone contended that it had done all that the trial court's order required, and Cornerstone requested sanctions against Peterson for filing a baseless motion.

¶8 The parties argued Peterson's motion on the day of trial. The trial court agreed with Peterson that the document entitled "itemization of damages" did not itemize Cornerstone's alleged damages. The trial court therefore ruled that Cornerstone had violated the pretrial order, and the trial court found that the violation was egregious. As a sanction, the trial court dismissed Cornerstone's claim for attorney's fees. The trial court then called for a jury array.

¶9 Cornerstone immediately declared that it would appeal the trial court's decision. Cornerstone next asserted that a jury trial under the circumstances "ma[de] no sense" and that Cornerstone would "stipulate to zero damages." Peterson interposed that she would object to entry of any judgment against her, and Cornerstone clarified its position that "the court will dismiss the case finding that there are no damages." Peterson joined that proposal. The trial

court responded, “[a]ll right. Based on the agreement between the parties that there are zero damages, at this point the case is dismissed.” Cornerstone appeals.

DISCUSSION

¶10 Cornerstone contends that the trial court erroneously dismissed the claim for attorney’s fees. In Cornerstone’s view, the document filed on May 23, 2012, satisfied the trial court’s order for an itemization of damages and, even if the document was inadequate, the trial court nonetheless erred by imposing too harsh a sanction. We conclude, however, that Cornerstone is not entitled to attorney’s fees, regardless of whether the trial court properly imposed sanctions: the claim for attorney’s fees arises under a contract that requires proof of damages before Cornerstone may obtain relief, but Cornerstone stipulated that it has no damages.

¶11 No dispute exists that Cornerstone’s claim for attorney’s fees is based on the contract between Peterson and Cornerstone for the sale to Peterson of a condominium unit. Interpretation of a contract is a question of law for this court’s *de novo* review. See ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶15, 259 Wis. 2d 587, 657 N.W.2d 411.

¶12 The contract provides, in pertinent part, that Peterson will:

indemnify and hold harmless the seller and its agents and employees from and against claims, damages, losses and expense, including but not limited to attorney’s fees arising out of or resulting from any item of construction performed by persons other than seller ... *but only to the extent caused in whole or in part by negligent acts or omissions of the Buyer or another directly or indirectly employed by her.*

(Emphasis added.) The parties agree that the contract requires a negligent act or omission on the part of Peterson (or someone she employed) before Cornerstone can pursue Peterson for relief under the contract’s terms. We agree as well. See

State v. Peppertree Resort Villas, Inc., 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345 (“When the terms of a contract are plain and unambiguous, we will construe the contract as it stands.”).

¶13 Cornerstone, however, cannot prove a negligent act, because a negligence claim cannot proceed absent damages. A cause of action for negligence requires: “(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.” *Rockweit v. Senecal*, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995). Further, “[i]t is fundamental that actual damage is an essential element of a cause of action based on negligence.” *Schweiger v. Loewi & Co.*, 65 Wis. 2d 56, 61, 221 N.W.2d 882 (1974).

¶14 Cornerstone stipulated that it has no damages. Therefore, it cannot prove negligence. Absent negligence, Peterson has no contractual obligation to indemnify Cornerstone or hold it harmless. Thus, Cornerstone cannot pursue her for attorney’s fees.

¶15 Cornerstone responds that it did not waive either its claim for attorney’s fees or its right to appeal. Cornerstone reminds us that it declared before pretrial proceedings ended that it would appeal the decision barring the claim for attorney’s fees, and Cornerstone asserts that it therefore did not “intentionally relinquish” its right to pursue the issue. See *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (stating that “waiver is the intentional relinquishment or abandonment of a known right”) (citation omitted). Cornerstone’s argument is misplaced. We do not hold that Cornerstone waived its claim for attorney’s fees. Rather, we conclude that Cornerstone’s stipulation that

it has no damages disposes of its claim for attorney's fees under the contract Cornerstone acknowledges is "the basis for the suit."

¶16 We need consider this appeal no further. *See Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 2008 WI App 116, ¶34, 313 Wis. 2d 93, 756 N.W.2d 461 (we may affirm a correct trial court decision for reasons other than those relied upon by trial court). Both parties, however, have addressed at some length whether the trial court properly exercised its discretion by sanctioning Cornerstone, and we choose to consider the issue for the sake of completeness.

¶17 A trial court may impose a sanction for failing to obey a court order. *Hefty v. Strickhouser*, 2008 WI 96, ¶71, 312 Wis. 2d 530, 752 N.W.2d 820. We review a trial court's decision to impose sanctions and the appropriateness of the sanctions chosen under an erroneous exercise of discretion standard. *See Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. We will uphold the trial court's discretionary decision "if the [trial] court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.* (citation omitted).

¶18 Cornerstone maintains that sanctions of any kind are unwarranted here because, it argues, it complied with the trial court's order to itemize damages. We reject this contention.

¶19 As the trial court accurately explained, the word "itemize" has a clear and common meaning. "In respect to 'itemize,' Webster's Third New International Dictionary provides this definition: '1a (1): to set down item by item.... (2): to specify the separate items of: list of each item of....' Black's defines 'itemize' as: 'To set down by items. To state each item or article

separately....” *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 52, 357 N.W.2d 548 (1984) (ellipses in original). The supreme court long ago took judicial notice of these definitions. *See id.* Thus, to “itemize” damages, Cornerstone was required to list with specificity each component that comprised the totality of the damages sought. The record indicates that the itemization should have separately identified, at a minimum: (1) the amounts paid to resolve the dispute with Commerce Bluff and the basis for any such amounts, including amounts claimed as costs; (2) the amount of attorney’s fees that Cornerstone claimed it incurred in resolving the dispute with Commerce Bluff and the basis for those claimed amounts; and (3) the amounts claimed for the alleged violation of WIS. STAT. § 893.89 and the basis for the amount sought.³ The document that Cornerstone filed on May 23, 2012, fell well short of providing this information.

¶20 Cornerstone nonetheless insists that it satisfied the trial court’s order to file an itemization of damages because, according to Cornerstone, the May 23, 2012 document “identified that Cornerstone would seek a specific dollar amount as its damages, i.e. the legal fees incurred by Cornerstone having to defend itself in the underlying litigation.” Cornerstone reads far more into the document than appears on the page. The document states a dollar amount but discloses no basis at all for the amount stated. Moreover, the document explicitly provides that the

³ Cornerstone alleged that it had a “tort-like” claim arising under WIS. STAT. § 893.89. “[Section] 893.89 constitutes a statute of repose in actions for injury resulting from improvements to real property.... [A] statute of repose limits the time period in which an action may be brought.” *Hocking v. City of Dodgeville*, 2010 WI 59, ¶19, 326 Wis. 2d 155, 785 N.W.2d 398 (footnote omitted). The purpose of § 893.89 is “to provide protection from long-term liability for those involved in the improvement to real property.” *Kalahari Dev., LLC v. Iconica, Inc.*, 2012 WI App 34, ¶6, 340 Wis. 2d 454, 811 N.W.2d 825 (citation and emphasis omitted). In light of the purpose and function of § 893.89, an itemization of the damages allegedly arising under this statute would likely have been useful to both Peterson and the trial court.

amount set forth is less than the undisclosed total amount of Cornerstone's alleged damages.

¶21 Cornerstone next argues that it did nothing wrong because it had no obligation to provide any specifics about the damages sought. In support of this theory, Cornerstone reminds us that “Wisconsin is a notice pleading state.” Cornerstone fails to show, however, that an itemization of damages constitutes a “pleading.” A “pleading” is defined in WIS. STAT. § 802.01(1) as a complaint, an answer, a reply to counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer. The trial court did not order Cornerstone to file any of the documents listed as pleadings in § 802.01(1). Accordingly, Cornerstone does not show that principles of “notice pleading” apply.

¶22 Equally unavailing is Cornerstone's suggestion that it did not violate the trial court's order because WIS. STAT. § 910.06 provides, in part: “[t]he contents of voluminous writings ... which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation.” This provision of the Wisconsin rules of evidence has no bearing on the issue here. The trial court did not order Cornerstone to prepare an evidentiary document for trial but rather ordered Cornerstone to file a pretrial itemization of damages. Moreover, as Peterson aptly points out, the trial court ordered Cornerstone to itemize, not summarize, its damages. We fully agree with the trial court's conclusion that Cornerstone “essentially ignored” that order.

¶23 Cornerstone contends, however, that, even assuming it failed to comply with the order to itemize damages, the trial court should not have imposed any sanctions because it did not pair the order with warnings that noncompliance could lead to harsh penalties. We disagree. WISCONSIN STAT. § 805.03 warns

litigants that failure to obey any order of the trial court may result in sanctions. No additional notice is required. *See Buchanan v. General Cas. Co.*, 191 Wis. 2d 1, 12, 528 N.W.2d 457 (Ct. App. 1995).

¶24 We turn to Cornerstone’s argument that, assuming Cornerstone deserved a sanction of any kind, the trial court selected too harsh a penalty. In addressing this contention, our inquiry “is not whether we, as an original matter, would have imposed the same sanction as the [trial] court; it is whether the [trial] court exceeded its discretion in imposing the sanction it did.” *Schultz v. Sykes*, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604.

¶25 A trial court may dismiss a claim as a sanction for noncompliance with a court order if the party’s conduct is egregious. *See Buchanan*, 191 Wis. 2d at 7-8. Conduct is “egregious” if it is “‘extraordinary in some bad way; glaring, flagrant.’” *East Winds Props., LLC v. Jahnke*, 2009 WI App 125, ¶15, 320 Wis. 2d 797, 772 N.W.2d 738 (citation and two sets of quotation marks omitted). When we assess whether the trial court properly ordered dismissal as a sanction for egregious conduct, “we examine the reasons given by the trial court for its decision.” *Buchanan*, 191 Wis. 2d at 9. We are bound by the trial court’s factual findings “unless they are ‘clearly erroneous.’ We will reverse a [trial] court’s imposition of a sanction ‘for noncompliance with a court order only when a party shows a clear and justifiable excuse’ for the noncompliance.” *Jahnke*, 320 Wis. 2d 797, ¶13 (citations and one set of quotation marks omitted).

¶26 Here, Cornerstone sought to excuse its noncompliance by suggesting that it misunderstood the requirements of the order for an itemization of damages and, relatedly, that the order did not sufficiently explain the disclosures required. The trial court found, however, that the words of its order are “commonly used,”

“specific,” and “readily understood.” The trial court also noted that it ordered an itemization of damages in response to a complaint from Peterson that she had “one number [she was] working with and didn’t know where that came from.” The trial court therefore did not agree that Cornerstone reasonably misunderstood what an “itemization” entailed in this context.

¶27 Cornerstone nonetheless believes that the trial court’s rationale was inadequate to support the sanction chosen. Cornerstone asserts that the trial court “never made a finding or determination that Cornerstone had done anything else during the course of the 71 months that the case was pending to require such a sanction.”

¶28 We do not agree that Cornerstone could not earn a sanction as severe as dismissal of a claim unless Cornerstone did “[some]thing else” in addition to the conduct that the trial court deemed egregious in this case. A failure to comply with a court’s pretrial order, particularly when that failure persists over time without correction or adequate excuse, may support the trial court’s conclusion that a party’s behavior reflects a “disregard of responsibilities” and warrants dismissal of the party’s action in its entirety. See *Trispel v. Haefer*, 89 Wis. 2d 725, 734-35, 279 N.W.2d 242 (1979) (citation and two sets of quotation marks omitted). In *Trispel*, the trial court dismissed the plaintiff’s case as a sanction when the plaintiff failed to meet a ten-week deadline for complying with a pretrial order, and the supreme court upheld the dismissal as a proper exercise of discretion. See *id.* at 735. As the *Trispel* court noted, “[s]ome means must be available to enable the trial judge to rein in uncooperative parties.” *Id.* (citation omitted).

¶29 Moreover, we reject Cornerstone’s intimation that the trial court imposed a sanction for an isolated act. Rather, the trial court sanctioned Cornerstone for a course of uncooperative conduct. That conduct began, but did not end, with Cornerstone’s failure to comply with the trial court’s order to provide an itemization of damages within the deadline Cornerstone selected. Thereafter, Cornerstone neither remedied its error nor sought clarification of its obligations—despite an opportunity to do so when Peterson moved for relief in light of Cornerstone’s inadequate disclosure. Cornerstone instead filed a memorandum in opposition to Peterson’s motion, asserting that she had asked for a document “entitled ‘itemization of damages’” and had received “exactly what she requested.” This response, echoed in Cornerstone’s later courtroom argument, suggested a determined disregard of Cornerstone’s responsibilities: for reasons that are too obvious to state, an obligation to provide a document entitled “itemization of damages” also includes an obligation to provide the itemization heralded by the title.

¶30 Further, Cornerstone coupled its opposition to Peterson’s motion with a request that the trial court punish Peterson for seeking relief. Maintaining that the motion was groundless and unsupported, Cornerstone contended that the order to itemize damages imposed no obligation “to set forth with any specificity the basis on which [Cornerstone is] claiming that [it] is entitled to \$333,000.27.” And finally, as the trial court noted when dismissing the action, Cornerstone persisted in violating the court order up to the moment when “the Court and the parties were prepared to commence a week long jury trial, with all of the attendant costs and obligations of the court, witnesses, and counsel.”

¶31 We conclude that the trial court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a

conclusion that a reasonable judge could reach. *See Marquardt*, 299 Wis. 2d 81, ¶41. Given the totality of the circumstances, we cannot say that the trial court erroneously deemed Cornerstone’s course of conduct “egregious,” that is, extraordinarily bad. *See Jahnke*, 320 Wis. 2d 797, ¶15. Accordingly, the trial court appropriately exercised its discretion when it dismissed the claim for attorney’s fees as a sanction in this case. We affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.